

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Entergy Services, Inc.

Docket No. ER03-811-003

ORDER ACCEPTING COMPLIANCE FILING, AS MODIFIED

(Issued July 26, 2005)

1. In this order, the Commission accepts, with modifications, a filing made by Entergy Services, Inc. (Entergy) to comply with a Commission order approving an Initial Decision and requiring Entergy to submit a revised Interconnection and Operating Agreement with Occidental Chemical Corporation (Occidental) that is based on Entergy's *pro forma* interconnection agreement (*pro forma* IA). However, we will require Entergy to change the effective date of the IA to the earlier date contractually agreed upon by the parties.

I. Background

2. On March 7, 2001, Entergy filed settlement agreements between its affiliate Entergy Louisiana, Inc. (Entergy Louisiana) and Occidental to interconnect both Occidental's Taft generating facility (Settlement Taft IA) and its Convent facility (Settlement Convent IA). The Settlement Taft IA, dated March 6, 2001, included section 23.8 (reopener provision), stating that if the Commission accepted for filing an Entergy *pro forma* IA, Occidental may execute such a Commission-approved *pro forma* IA instead of the Settlement Taft IA. The reopener provision expressly states that the effective date would remain unchanged from that specified in the Settlement Taft IA. The Settlement Taft IA did not provide transmission credits for Required System Upgrades, but instead included the "Principles for Waterford Breaker Upgrade Cost Allocation" (Breaker Principles), which stated that Occidental would fund Required System Upgrades. The Commission approved the settlement agreements.¹ By executing Entergy's *pro forma* IA, however, Occidental would start receiving transmission credits for Required System Upgrades.

¹ *Entergy Services, Inc.*, 95 FERC ¶ 61,213 (2001).

3. On May 2, 2003, Entergy filed an agreement (Amended Taft IA) that included a provision modifying the initial point of interconnection for the Taft facility. Entergy Louisiana and Occidental agreed upon this modification, but the Amended Taft IA was unexecuted because the parties disagreed over the inclusion of the reopener provision. Entergy Louisiana included the reopener provision in the unexecuted Amended Taft IA, but objected to doing so.

4. The Commission accepted the unexecuted Amended Taft IA for filing, suspended it and made it effective May 3, 2003, subject to refund, and established hearing procedures.² The order set for hearing the dispute over the inclusion of the reopener provision. The parties stipulated to the Administrative Law Judge (ALJ) that the issue set for hearing was:

Whether section 23.8, as contained in the original Taft IA and the Settlement Taft IOA, allows Occidental to execute Entergy's most recent FERC-accepted *Pro Forma* interconnection and operating agreement ("*Pro Forma* IOA") in place of, *and with the same effective date as*, the previously-filed and accepted interconnection and operating agreement that was part of the Taft Settlement Agreement.³ (Emphasis added).

5. The ALJ issued an Initial Decision that found that the reopener provision, as contained in the Original Taft IA and the Settlement Taft IA, allows Occidental to execute Entergy's most recent Commission-accepted *pro forma* IA in place of, and with the same effective date as, the previously-filed and accepted IA that was part of the Settlement Taft IA.⁴ The Commission agreed.⁵

6. Entergy then submitted its compliance filing (Compliance IA) in response to the Commission Opinion.⁶ Entergy states that the Compliance IA is based on its *pro forma* IA, which was accepted by the Commission on October 10, 2002. It also claims that because the Suspension Order made the Amended Taft IA effective May 3, 2003, that should be the effective date of the Compliance IA.

² *Entergy Services, Inc.*, 103 FERC ¶ 61,375 (2003) (Suspension Order), *reh'g denied*, 105 FERC ¶ 61,016 (2003).

³ *Entergy Services, Inc.*, 107 FERC ¶ 63,054 at P 10 (2004) (Initial Decision).

⁴ *Id.* at P 64.

⁵ *Entergy Services, Inc.*, 109 FERC ¶ 61,342 (2004) (Commission Opinion), *reh'g denied*, 110 FERC ¶ 61,365 (2005).

⁶ Entergy's Compliance IA is unexecuted.

II. Notice, Interventions, and Protests

7. Notice of Entergy's filing was published in the *Federal Register*,⁷ with interventions and protests due on or before May 3, 2005. Occidental filed a protest, which Entergy answered. Occidental filed a limited response and Entergy filed a reply.

8. In its protest, Occidental argues that Entergy has not complied with the Commission Opinion. It states that the effective date mandated by the reopener provision is March 6, 2001.⁸ Occidental states that Entergy's unilateral assignment of the later effective date reduces by \$1.2 million the accrued interest on its payments for the Required and Optional System Upgrades and also reduces the amount of transmission credits Occidental would be entitled to receive. Occidental states that if Entergy did not agree with the March 6, 2001 effective date, it should have objected in its Brief on Exceptions or request for rehearing of the Commission Opinion. Occidental states that because Entergy did not raise the issue, the issue is deemed waived.

9. In its answer, Entergy argues that the May 3, 2003 effective date is consistent with the Commission's Suspension Order and consistent with the Commission's treatment of similar issues in other proceedings. Entergy argues that neither the Initial Decision nor the Commission Opinion addressed or rejected the effective date that had been established in the Commission's Suspension Order setting the issue for hearing. Entergy states that Occidental is ignoring the fact that the Commission ordered the May 3, 2003 effective date rather than Entergy assigning this date. It states that Occidental did not contest the May 3, 2003 effective date when it sought rehearing of the Suspension Order. Entergy asserts that the May 3, 2003 effective date is consistent with Commission precedent providing guidance with respect to compliance filing effective dates.⁹ It also argues that the Commission does not have authority under the Federal Power Act (FPA) to permit the Compliance IA to have an effective date more than two years before the filing because the Commission cannot order retroactive calculations of prices under the FPA. According to Entergy, the FPA also prohibits the Commission from requiring that interest begin to accrue on payments Occidental has made under the settlement agreements before the May 3, 2003 effective date.

10. In its limited response, Occidental argues that the Commission Opinion resolved the meaning of the reopener provision and that Entergy is now attempting to re-litigate

⁷ 70 Fed. Reg. 22,020 (2005).

⁸ Occidental's proposed effective date of March 6, 2001 is when the parties executed the settlement agreements.

⁹ Entergy cites *Arkla Energy Resources*, 58 FERC ¶ 61,050 (1992), *reh'g denied and clarification*, 59 FERC ¶ 61,223 (1992), and *Midwest Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,085 (2004), to support its assertion.

that issue. Occidental challenges Entergy's contention that the May 3, 2003 effective date is appropriate because Occidental failed to contest the date set in the Suspension Order. It states that its position has been clear throughout the proceedings that the *pro forma* IA entered into under the reopener provision shall have the same effective date as the date of the Settlement Taft IA, March 6, 2001. Occidental argues that the Initial Decision and the Commission Opinion were clear that the *pro forma* IA would have the same effective date as the Settlement Taft IA. Occidental also argues that interest must be accrued on its payments for System Upgrades, pursuant to the *pro forma* IA, from the date Occidental made its payments, not from March 6, 2001.

11. In its reply, Entergy argues that the *pro forma* IA does not support Occidental's position that interest must be calculated from the date of Occidental's payments. It says that when the Commission has attached a transmission credit obligation to costs that were previously directly assigned to a customer pursuant to a final Commission order, the Commission has held that the date when interest begins accruing is the refund effective date established for that proceeding.¹⁰

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Entergy's answer because it has provided information that assisted us in our decision-making process. Further, we will accept Occidental's limited response and Entergy's reply.

B. Effective Date of the Compliance IA

14. We disagree with Entergy's assertion that neither the Initial Decision nor the Commission Opinion addressed or rejected the May 3, 2003 effective date included in the Suspension Order. As seen above, both parties stipulated to the issue set for hearing: whether Occidental had the right to execute Entergy's most recent Commission-accepted *pro forma* IA in place of, and *with the same effective date as*, the previously-filed and

¹⁰ Entergy cites *Duke Energy Hinds, LLC*, 102 FERC ¶ 61,068 at P 28 (2003), *reh'g pending*, and *Wrightsville Power Facility, L.L.C. v. Entergy Arkansas, Inc.*, 102 FERC ¶ 61,212 at P 24, 34, 37, and 44 (2003), to support this assertion.

accepted interconnection and operating agreement that was part of the Settlement Taft IA. We disagree with Entergy's claims that Occidental "sat on its rights with respect to the Commission's determination of an effective date for the Amended IOA" ¹¹ Further, by stipulating to this statement of the issue, Entergy clearly admitted that if Occidental was entitled to switch to the *pro forma* IA, it was entitled to the earlier effective date.

15. The ALJ found that Occidental could:

execute Entergy's most recent FERC-accepted *pro forma* interconnection and operating agreement in place of, and *with the same effective date as*, the previously-filed and accepted interconnection and operating agreement that was part of the Taft Settlement Agreement. ¹² (Emphasis added).

16. Section 23.8, the reopener provision, clearly states that Occidental has the right to "execute such FERC-approved form in lieu of this Agreement with the express understanding that the effective date thereof shall remain unchanged from that specified in this Agreement." The Commission Opinion adopted the Initial Decision without modification. As noted by Occidental, Entergy failed to raise the issue of the effective date in its Brief on Exceptions or request for rehearing. By failing to object to the effective date set by the Initial Decision, Entergy waived its right to object to the effective date. ¹³ Instead, Entergy waited until it made its compliance filing to change the effective date back to May 3, 2003. This is a collateral attack on the Initial Decision and the Commission Opinion.

17. Entergy cites *Arkla Energy Resources* ¹⁴ and *Midwest Indep. Sys. Operator, Inc.* ¹⁵ for the proposition that compliance sheets submitted in the proceeding should have the same effective date as was initially established for the tariff sheets in the order that first accepted such sheets for filing. However, in both of those cases, the filing party was not later directed to make a compliance filing with a different effective date than the one the Commission originally adopted. In citing *Arkla* and *Midwest ISO*, Entergy conveniently ignores the fact that the ALJ's Initial Decision and the Commission Opinion specifically set the effective date of the agreement as that of the Settlement Taft IA. Moreover, those

¹¹ Answer of Entergy Services, Inc. at 6.

¹² Initial Decision at P 64.

¹³ 18 C.F.R. § 385.711(d) (2005).

¹⁴ *Arkla Energy Resources*, 58 FERC ¶ 61,050 (1992), *reh'g denied and clarification*, 59 FERC ¶ 61,223 (1992).

¹⁵ *Midwest Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,085 (2004).

cases did not involve reopener provisions, such as the one here, which specifically gives Occidental the right to the earlier effective date.

18. Entergy claims that the Commission does not have the authority under the FPA to give the Compliance IA an effective date more than two years prior to the filing of the modifications proposed in those filings because we do not have the authority to set rates retroactively. However, we did not violate the rule against retroactive ratemaking in setting the earlier effective date. The issue here was whether, under the reopener provision -- a contractual provision to which Entergy agreed -- Occidental could execute Entergy's most recent *pro forma* IA in place of, and with the same effective date as, the Settlement Taft IA. The compliance filing before us is directly related to the settlement agreements which the parties executed on March 6, 2001 and which Entergy filed with the Commission on March 7, 2001. Entergy acknowledged this fact when it stipulated to the issue before the ALJ.

19. Moreover, we note that the May 3, 2003 effective date set in the Suspension Order (the date on which Entergy made the filing being suspended) does not contradict the Commission's conclusion in the Opinion that Occidental was entitled under the reopener provision to switch to Entergy's *pro forma* IA with the same effective date specified in the Settlement Taft IA. The Suspension Order accepted for filing a contract that *by its own terms* allowed Occidental to have the benefit of that earlier effective date, and the Suspension Order in no way deprived Occidental of that right.

20. Entergy's answer introduces extrinsic evidence regarding the effective date of the Compliance IA. Specifically, Entergy quotes a February 4, 2005 letter sent by Occidental to Entergy which states that a compliance filing would "entitle[] Occidental to credits against transmission service from and after May 2, 2003, which is the date that the Amended IA was filed with FERC, for all system upgrades (both Required System Upgrades and Optional System Upgrades)."¹⁶ As noted above, the Initial Decision and the Commission Opinion adopt the earlier effective date. Therefore, we do not find this extrinsic evidence probative.

21. Entergy argues in its reply that where the Commission has reclassified facilities from directly assignable to network upgrades, thereby requiring that the utility give the Customer credits against its transmission bills in order to repay the Customer for its up-front payment the date when interest begins to accrue is the refund date established for the proceeding.¹⁷ Entergy asserts that this date is May 3, 2003. However, the cases Entergy cites involved the *Commission* acting on a *prospective* basis to reclassify the

¹⁶ Letter from Zori G. Ferkin to Floyd L. Norton IV of Feb. 4, 2005 at 1.

¹⁷ Entergy cites *Duke Hinds, LLC*, 102 FERC ¶ 61,068 at P 28, and *Wrightsville Power Facility*, 102 FERC ¶ 61,212 at P 24, 34, 37, 44, to support this assertion.

facilities and thus to require credits, with interest. Here, the contract itself, to which Entergy agreed, allows Occidental to switch to Entergy's *pro forma* IA, which provides for credits, with the same effective date as the Settlement Taft IA. Thus, transmission credits begin on the date of Occidental's first use of the transmission system.

22. Section 8.3.1 of Entergy's April 12, 2005 compliance filing states that interest will be calculated in accordance with 18 C.F.R. § 35.19a of the Commission's regulations. Entergy itself agreed to this method of calculating interest on the Required System Upgrades and Optional System Upgrades. Despite the fact that it executed and filed this agreement, Entergy is now trying to change how interest is calculated. Furthermore, pursuant to section 8.3.1 of the Compliance IA and its reliance on 18 C.F.R. § 35.19a for interest calculation, we find that interest shall be computed from the date Occidental provided initial funding for either Required System Upgrades or Optional System Upgrades until the date refunds are paid in full.

23. For these reasons, we direct Entergy to refile its compliance filing with an effective date of March 6, 2001.¹⁸

C. The Compliance Filing

24. Our review of Entergy's April 12, 2005 compliance filing finds that, with the exception of the issues discussed above, Entergy has complied with the mandates of the Commission Opinion.¹⁹ However, in "Appendix B—System Upgrades" of the Amended and Restated Interconnection and Operating Agreement, Entergy has included a sentence that states that "In addition, Customer and Company hereby acknowledge and agree that the cost responsibility with respect to the Required System Upgrades only will be subject to the 'Principles for Waterford Breaker Upgrade Cost Allocation,' appended to this Appendix B." Since the Breaker Principles have been removed from the Compliance IA, this sentence creates confusion and we direct Entergy to remove this sentence when it makes its compliance filing.

¹⁸ The Commission adopts March 6, 2001 as the agreement's effective date at Occidental's request. We note that the Commission order accepting the settlement agreements actually makes the effective date earlier, May 27, 2000. *Entergy Services, Inc.*, 95 FERC ¶ 61,213 (2001).

¹⁹ Entergy's Transmittal Letter references its pending Independent Coordinator of Transmission (ICT) proposal. Transmittal Letter at 4. The Commission stated that it believes the ICT may be just and reasonable with certain modifications. *See Entergy Services, Inc.*, 110 FERC ¶ 61,295 (2005). Entergy made a section 205 filing in, Docket No. ER05-1065-000, detailing the enhanced functions that the ICT will perform. The Commission is in the process of reviewing the specifics of Entergy's proposal now that it has filed a full set of tariff provisions implementing the ICT proposal.

The Commission orders:

Entergy's compliance filing is accepted, subject to the modifications discussed in the body of this order being filed within 30 days of issuance of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.